

DEC 23 2005

NOT FOR PUBLICATION

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No. NC-05-1205-MaSZ
)	
MIZRAIM MOHAMMED EL and)	Bk. No. 04-45048
PATRESE M. EL,)	
)	
Debtors.)	
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MIZRAIM MOHAMMED EL and)	
PATRESE M. EL,)	
)	
Appellants,)	
v.)	<u>MEMORANDUM</u> ¹
)	
MARTHA BRONITSKY, Chapter 13)	
Trustee; RUDY SPATENKA; SELECT)	
PORTFOLIO SERVICING, INC.,)	
)	
Appellees.)	
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Argued and Submitted on November 16, 2005
at San Francisco, California

Filed - December 23, 2005

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Edward D. Jellen, Bankruptcy Judge, Presiding.

Before: MARLAR, SMITH AND ZURZOLO,² Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

² Hon. Vincent P. Zurzolo, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 **INTRODUCTION**

2
3 In bankruptcy court, the pro se chapter 13³ debtors asserted
4 that their debts had been discharged prior to full payment in
5 accordance with their confirmed plan, and they sought an order to
6 that effect. The court denied their motion for an early discharge
7 as legally insufficient.

8 After the debtors filed this appeal of the court's order,
9 their chapter 13 case was dismissed. Both orders have been timely
10 appealed. We conclude that there was no legal error in the
11 bankruptcy court's rulings and AFFIRM.

12
13 **FACTS**

14
15 Mizraim Mohammed El and Patrese M. El ("Debtors") filed a
16 chapter 13 petition on September 15, 2004. At that time, they
17 owned real property in Richmond, California, including residential
18 real property, located at 2808 Cutting Blvd.⁴

19 Select Portfolio Servicing, Inc. ("Select Portfolio") was a
20 secured creditor with a loan claim in the amount of \$195,826.77,
21 which was secured by a lien on Debtors' residential real property.

22
23 ³ Unless otherwise indicated, all chapter and section
24 references are to the pre-amended Bankruptcy Code ("Bankruptcy
25 Code" or "Code"), 11 U.S.C. §§ 101-1330, and rule references are
to the Federal Rules of Bankruptcy Procedure ("Fed. R. Bankr.
P."), Rules 1001-9036.

26 ⁴ We take judicial notice of pertinent items in the
27 bankruptcy court records, such as the chapter 13 petition and
28 schedules, the plan, the claims register, and pleadings referenced
by the appellants. O'Rourke v. Seaboard Sur. Co. (In re E.R.
Fegert, Inc.), 887 F.2d 955, 957 (9th Cir. 1989) (panel may take
judicial notice of bankruptcy court records).

1 Rudy Spatenka ("Spatenka") was a secured creditor holding a
2 promissory note from Debtors in the amount of \$148,500, which was
3 secured by a first deed of trust ("DOT") and assignment of rents
4 in other real property, located at 2901 Cutting Blvd.⁵

5 At the time of the chapter 13 filing, Debtors were
6 approximately \$4,000 in default under Spatenka's Note and DOT and
7 \$20,000 in arrears to Select Portfolio.

8 Spatenka originally objected to Debtors' proposed chapter 13
9 plan on feasibility grounds. Thereafter, through their attorney,
10 Timothy J. Walsh ("Walsh"), Debtors entered into a stipulation
11 with Spatenka to make certain amendments to the plan.

12 Debtors' first amended plan proposed to make plan payments of
13 \$740 per month for 60 months, including the curing of arrearages.
14 It further provided for direct monthly payments to Spatenka and
15 Select Portfolio in the amounts of \$1,608.75 and \$1,700,
16 respectively. Finally, the plan provided for a balloon payment to
17 Spatenka of the entire debt balance before the 60th month of the
18 plan.

19 The plan was confirmed on March 2, 2005. The confirmation
20 order made the following provisions for Spatenka's debt:

21 2. The trustee shall make disbursements on the
22 secured claim of [Spatenka] per the claim filed, with
interest at the rate of 10%;

23 3. The debtor shall pay directly [Spatenka] [sic],
24 the sum of \$1,608.75 per month;

25 4. The debtor will further propose pursuant to 11 USC
26 1322(b): [Spatenka] to be paid in full within 60 months or
prior to the end of 60 months, in the amount of the entire
indebtedness of approximately \$148,500.00;

27
28 ⁵ Spatenka filed secured claims for \$5,457.34 and \$153,957.
The record does not show that these claims were the subject of an
objection. See Fed. R. Bankr. P. 3007.

1 5. Debtor shall maintain homeowner's insurance on the
2 real property at 2901 Cutting Bl, Richmond, Ca, and provide
proof to creditor [Spatenka];

3 6. Debtor shall maintain all post petition property tax
4 on said real property, as they [sic] become due, and provide
proof to creditor [Spatenka];

5 7. In the event the debtors do not make the regular
6 monthly payments to [Spatenka], by the 10th of each month, or
7 default as to the providing of home owner's [sic] insurance, or
8 timely payment of property tax on said real estate, creditor
9 [Spatenka] may serve a letter upon debtors and debtors' counsel
10 by first class postage, with a notice of 10 days to cure said
11 default; if said default is not cured within the 10 days, the
automatic stay will lift without further notice or hearing;
debtors will have the right to cure on only 3 separate
occasions; upon the fourth occasion of default, as described
above, the automatic stay will lift without further notice to
debtors or debtors' counsel.

12 Order Approving Chapter 13 Plan (March 2, 2005), pp. 1-2.

13 Almost immediately, Debtors defaulted and, on or about March
14 11, 2005, Spatenka served a first letter notice of default on
15 Debtors regarding the regular March payment. On or about March
16 17, 2005, Spatenka served a second letter notice indicating that,
17 although he had received \$1,607 from Debtors, that amount was
18 insufficient, as the regular payment was \$1,608.75 plus a late
19 penalty of \$160.88. In addition, Spatenka demanded that Debtors
20 submit evidence of homeowners' insurance.

21 Debtors responded, without benefit of counsel, on March 17,
22 2005, by serving upon the chapter 13 trustee ("Trustee"), Spatenka
23 and Select Portfolio, and filing with the court, a pleading
24 entitled "ACTION (UCC1-201(1) [sic] BY NOTICE OF TENDER AND TENDER
25 IN TRANSFER, SATISFYING i.e. DISCHARGING ALL ALLEGED DEBT--
26 TOGETHER WITH NOTICE OF MOTION AND AND [SIC] MOTION TO DISCHARGE
27 ALLEGED DEBTORS BEFORE COMPLETION OF CHAPTER 13 PLAN PURSUANT TO
28 TITLE 11 U.S.C. SECT. 1328(b)" ("Motion for Discharge of Debts").

1 Debtors did not, however, ask the court to allow a post-
2 confirmation modification to the plan pursuant to § 1329.

3 Basically, Debtors asserted that they could extinguish and
4 discharge the debts owed to Spatenka and Select Portfolio, as well
5 as the plan payments to Trustee. They proposed to do this via
6 self-styled promissory notes and documents given to each one,
7 which were based upon Debtors' unilateral view of the law and how
8 it should work, a view that was completely contrary to their
9 confirmed plan.

10 The documents being substituted for actual cash payments were
11 unorthodox. Accompanying the promissory note was a "self-
12 executing" security agreement,⁶ which labeled Trustee as "User"
13 and the so-called secured party as Debtors, themselves, under an
14 alleged trade-name/trademark, MIZRAIM MOHAMMED EL©, PATRESE
15 MOHAMMED EL©, PATRESE MICHELLE ALSTON©.⁷ The documents included
16 some type of duty by which Trustee could "opt-out" only by ceasing
17 to "use" the estate's property. The security agreement purported
18 to prevent Trustee from any unauthorized "use" of the "trade-name"
19 or the collateral, under pain of monetary sanctions.

20 A financing statement was attached which designated, as both
21 the Debtor and the secured party, Mizraim Mohammed El, and
22 described as "collateral" all of his real and personal property.

23 All in all, these documents were virtually incomprehensible,
24 unsupported by applicable bankruptcy law, and legally ineffective.
25 None of the affected parties had agreed to this new treatment of
26 their obligations.

27
28 ⁶ Only the documents provided to Trustee have been included
in the excerpts of record.

⁷ The significance of the copyright symbols is unexplained.

1 After receiving these documents, on March 22, 2004, Spatenka
2 filed a "Declaration Re Breach of Chapter 13 Plan and Adequate
3 Protection Order." He requested immediate relief from the
4 automatic stay due to Debtors' failure to pay the March payment in
5 full and to provide proof of homeowners' insurance and payment of
6 real estate taxes.

7 Spatenka also filed a response to the Motion for Discharge of
8 Debts, which he stated lacked factual or legal basis, describing
9 it as "nonsensical and near impossible to decipher." He
10 challenged Debtors' attempt to unilaterally replace his secured
11 lien with other incomprehensible and legally invalid documents.

12 On April 6, 2005, Walsh filed a motion to withdraw as
13 Debtors' counsel. Matters then worsened for Debtors when, on
14 April 7th, Trustee filed a "Notice of Default in Chapter 13 Plan
15 Payments and Demand for Cure." The notice informed Debtors that
16 they were delinquent in their chapter 13 plan payments, and that
17 if they did not pay \$1,480 within 20 days, their case could be
18 immediately dismissed without further notice or hearing.

19 On April 14, 2005, Debtors followed up on their Motion for
20 Discharge of Debts with the service and filing of a "Notice of
21 Alleged Creditors [sic] Acceptance of Alleged Debtors [sic] Tender
22 of Credits and Offer of Performance Made and Offered on March 17,
23 2005." They asserted that Trustee's and Select Portfolio's
24 silence was an "acceptance" of their position, and, additionally,
25 that Spatenka, by not verifying the debt, also "accepted" the new
26 treatment.

27

28

1 These unusual events culminated in a hearing on May 5, 2005.⁸
2 First, the bankruptcy court granted Walsh's motion to withdraw.
3 Next, addressing Debtors' Motion for Discharge of Debts, the
4 bankruptcy court reasoned, among other things, that the Uniform
5 Commercial Code ("UCC") sections which Debtors had proffered were
6 not applicable to secured interests in real property. It
7 therefore denied the Motion.

8 The bankruptcy court noted that Debtors were still in default
9 under their plan as to Spatenka's debt. It also confirmed, with
10 Trustee, that Debtors were still in default in their plan
11 payments, in the sum of \$1,480. The court therefore granted
12 Spatenka's motion and, independently, dismissed the chapter 13
13 case for the plan payment default. It ordered the automatic stay
14 to be lifted after May 25, 2005.⁹

15 Separate orders were then entered, as follows:

- 16 - Order Denying Motion for Discharge of Debts - May 6, 2005
17 - Order Re Breach of Chapter 13 Plan - May 10, 2005
18 - Order Granting Motion to Withdraw - May 10, 2005
19 - Order Dismissing Case - June 6, 2005

20 Debtors timely appealed the Order Denying Motion for
21 Discharge of Debts and the Order Dismissing Case, and we review
22

23 ⁸ The transcript of this hearing was ordered and filed with
24 the bankruptcy court and with the BAP. Although it was not
25 included in the excerpts of record, we presume that Debtors
26 intended it to be, as it is necessary for us to review their
27 argument. See Ehrenberg v. Cal. State Univ. (In re Beachport
28 Entm't), 396 F.3d 1083, 1087 (9th Cir. 2005) (panel abuses its
discretion if it fails to consider the impact of a sanction for
procedural violations). Therefore, we will consider it.

⁹ Mr. El, appearing pro se at oral argument, stated that
foreclosure had not yet occurred.

1 both orders.¹⁰

2
3 **ISSUES**
4

- 5 1. Whether the bankruptcy court erred in denying the Motion
6 for Discharge of Debts.
7
8 2. Whether the bankruptcy court abused its discretion in
9 dismissing the chapter 13 case.
10
11 3. Whether the bankruptcy court's orders were void because
12 they violated Debtors' due process rights, or were
13 products of fraud or judicial bias.
14

15 **STANDARD OF REVIEW**
16

17 The bankruptcy court's findings of fact are reviewed for
18 clear error and its conclusions of law, including its
19 interpretation of the Bankruptcy Code, are reviewed de novo.
20 Latman v. Burdette, 366 F.3d 774, 781 (9th Cir. 2004).

21 "A reorganization plan resembles a consent decree and
22 therefore, should be construed basically as a contract." Hillis
23 Motors, Inc. v. Haw. Auto. Dealers' Ass'n, 997 F.2d 581, 588 (9th
24

25 ¹⁰ Debtors' notice of appeal expressed their intent to appeal
26 both orders, although it was premature as to the dismissal order,
27 and we have jurisdiction over both orders. See Munoz v. S.B.A.,
28 644 F.2d 1361, 1364 (9th Cir. 1981) (intent to appeal from a
specific judgment may be fairly inferred from the notice); Fed. R.
Bankr. P. 8002(a) (premature notice of appeal is considered filed
upon entry of final judgment).

1 Cir. 1993). In the absence of factual issues, questions of
2 contract enforcement and interpretation are subject to de novo
3 review. See Dolven v. Bartleson (In re Bartleson), 253 B.R. 75,
4 79 (9th Cir. BAP 2000).

5 A bankruptcy court's decision to dismiss a chapter 13 case
6 "for cause" pursuant to § 1307(c) is reviewed for an abuse of
7 discretion. Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1223
8 (9th Cir. 1999). A court necessarily abuses its discretion when
9 it makes an error of law. Debbie Reynolds Hotel & Casino, Inc. v.
10 Calstar Corp. (In re Debbie Reynolds Hotel & Casino, Inc.), 255
11 F.3d 1061, 1065 (9th Cir. 2001).

12 The question of whether the requirements of due process have
13 been satisfied is one of law which we review de novo. Willamette
14 Waterfront, Ltd., v. Victoria Station Inc. (In re Victoria
15 Station, Inc.), 875 F.2d 1380, 1382 (9th Cir. 1989).

17 DISCUSSION

19 **A. Debtors' Tender was Legally Insufficient and an Improper** 20 **Attempt to Modify the Chapter 13 Plan**

21 Debtors proposed to pay off their chapter 13 plan obligations
22 by giving Trustee a "promissory note" in the amount of \$54,000 as
23 well as other self-styled documents. This option was not what
24 their plan called for, and they had no unilateral right to change
25 its terms or to impose unauthorized conditions on other parties.

26 Debtors' obligation under the plan, which they voluntarily
27 proposed and for which they had obtained confirmation, was to pay
28 money in monthly installments. A debtor and all creditors are

1 bound by the provisions of a chapter 13 plan. See § 1327(a). The
2 creditors "have a justifiable expectation that they will be
3 treated in accordance with" the plan's terms. In re Richardson,
4 192 B.R. 224, 228 (Bankr. S.D. Cal. 1996). Thus, the plan acts as
5 a contract between the debtor and the debtor's creditors and
6 governs their contract rights until the plan is properly modified.
7 See Hillis Motors, 997 F.2d at 588 (discussing nature of chapter
8 11 plan); In re O'Brien, 181 B.R. 71, 78 (Bankr. D. Ariz. 1995).

9 Debtors did not file a motion to modify their plan, post-
10 confirmation. Instead, Debtors argued that they acted pursuant to
11 the UCC and California law.

12 First, the bankruptcy court correctly ruled that the UCC was
13 inapplicable to this situation. The only creditors listed in
14 Debtors' plan were secured creditors with liens on Debtors' real
15 property and the tax collector. The UCC is designed to promote a
16 fair and efficient framework for commercial transactions involving
17 personalty and fixtures. See UCC § 1-102, Cal. Com. Code § 1102;
18 Ford & Vlahos v. ITT Commer. Fin. Corp., 8 Cal. 4th 1220, 1234,
19 885 P.2d 877, 886, 36 Cal. Rptr. 2d 464, 473 (1994). It has no
20 bearing on real property transactions, tax obligations, or on the
21 professional relationship between a chapter 13 trustee and the
22 debtor, which is governed by the Bankruptcy Code.

23 Second, Debtors argued that, pursuant to California law, they
24 had extinguished their obligations by tendering their offers and,
25 thus, were entitled to an early order of discharge. To the extent
26 Debtors attempted to usurp federal bankruptcy law, the state law
27 upon which they relied was pre-empted, "because the ability to
28 grant a discharge is 'one of the principal requisites'" of federal

1 bankruptcy law. Sherwood Partners, Inc. v. Lycos, Inc., 394 F.3d
2 1198, 1203 (9th Cir.) (quoting Stellwagen v. Clum, 245 U.S. 605,
3 616 (1918)) (state statutes that purport to grant a bankruptcy
4 discharge are preempted), cert. denied, ___ U.S. ___, 126 S.Ct.
5 397 (2005). See also, Aerocon Eng'g, Inc. v. Silicon Valley Bank
6 (In re World Aux. Power Co.), 303 F.3d 1120, 1128-29 (9th Cir.
7 2002) (state laws that conflict with a federal statutory scheme
8 are preempted).

9 Debtors' discharge was governed by the Bankruptcy Code and
10 the terms of their confirmed plan, and we review this appeal in
11 the context of the substantive law, both pre- and post-
12 confirmation.

13 Debtors' residential real property was scheduled with a value
14 of \$310,000 and reflected a lien of Select Portfolio in the amount
15 of \$215,000. In regards to the treatment of such secured claim,
16 the Code permits only the curing of arrearages over a reasonable
17 time. See § 1322(b) (5). Otherwise, the rights of such
18 residential secured creditor may not be modified. See
19 § 1322(b) (2). In compliance with the Code, Debtors' plan proposed
20 to cure the arrearage over time and to make the monthly loan
21 payments of \$1,700 directly to Select Portfolio.

22 Spatenka's lien was listed on Debtors' schedules in the
23 amount of \$160,000 on other real property valued at \$470,000.
24 Under the Code, § 1325(a) (5) requires that, unless a secured
25 creditor accepts the plan or the collateral which secures the
26 claim is surrendered, the plan must provide for the retention of
27 the creditor's lien and provide for the distribution of cash
28 payments which are not less than the allowed amount of the claim.

1 See § 1325(a)(5)(B)(i) and (ii). Compliance with the payment
2 requirement of § 1325(a)(5)(B)(ii) is mandatory. See Barnes v.
3 Barnes (In re Barnes), 32 F.3d 405, 407 (9th Cir. 1994). In
4 addition, § 1322(b)(5) provides for the curing of arrearages and
5 maintenance of payments in a plan, and § 1322(b)(8) allows
6 "payment" of all or part of a claim from either estate property or
7 Debtors' property. 11 U.S.C. § 1322(b)(8).

8 In meeting Code requirements, Debtors proposed a plan which
9 would cure the \$4,000 arrearage through the monthly plan payments,
10 pay \$1,608.75 directly to Spatenka each month, and pay off the
11 entire secured debt with a cash payment before 60 months.

12 Another condition of confirmation is that the plan must be
13 feasible, in that "[t]he debtor will be able to make all payments
14 under the plan" 11 U.S.C. § 1325(a)(6). Debtors'
15 confirmed plan nowhere provided that the required "payments" could
16 be in a form other than what the Code and the parties intended--
17 cash.

18 The Code further requires that each month, for the term of
19 the plan, the debtor must submit "all or such portion of future
20 earnings or other future income . . . as is necessary for the
21 execution of the plan." 11 U.S.C. § 1322(a)(1). Debtors' plan
22 was confirmable because it set forth the proper treatment of the
23 secured creditors' claims. Additionally, it called for cash
24 payments of \$740 each month to Trustee. Once the plan was
25 confirmed, it was legally binding upon Debtors and each creditor.
26 See § 1327(a).

27 In the normal course of a plan, a debtor makes all of the
28 payments under its terms and, after completing such payments, is

1 entitled to a discharge. See § 1328(a). A "hardship" discharge
2 may be granted before all payments have been made "only if":

3 (1) the debtor's failure to complete such payments is due
4 to circumstances for which the debtor should not justly be
held accountable;

5 2) the value, as of the effective date of the plan, of
6 property actually distributed under the plan on account of
7 each allowed unsecured claim is not less than the amount
that would have been paid on such claim if the estate of
the debtor had been liquidated under chapter 7 of this
title on such date; and

8 (3) modification of the plan under section 1329 of this
9 title is not practicable.

10 11 U.S.C.A. § 1328(b).

11 Debtors satisfied none of the statutory conditions for an
12 early or "hardship" discharge. Instead, they unilaterally
13 attempted to force their secured creditors, as well as Trustee, to
14 accept something other than the cash payments promised in their
15 plan, under which they and their creditors were bound. It is not
16 surprising that Trustee and the affected secured creditors
17 resisted that effort.

18 Post-confirmation changes to a plan are governed by § 1329.
19 Debtors did not file a motion to modify their plan post-
20 confirmation. Or, if they were attempting to modify their plan,
21 they failed to comply with the requirements of § 1329.

22 Modification is essentially a new plan confirmation and must
23 be consistent with the statutory requirements for confirmation.
24 See Max Recovery, Inc. v. Than (In re Than), 215 B.R. 430, 434
25 (9th Cir. BAP 1997); see also § 1329(b)(1). Had Debtors attempted
26 to modify their plan pursuant to the Code, any modifications would
27 also be subject to the requirements of §§ 1322(a) and (b),
28 1323(c), and 1325(a). See § 1329(b)(1).

1 Not having a proper modified plan before it, either
2 substantively or procedurally, the bankruptcy court did not err in
3 rejecting Debtors' efforts to substitute bizarre, legally
4 ineffective pieces of paper for their promises (both pre- and
5 post-bankruptcy) to pay cash in order to satisfy legal obligations
6 which they had voluntarily incurred.

7 Based on the foregoing analysis, we conclude that Debtors'
8 offers of tender to Trustee and the secured creditors were legally
9 insufficient to effectuate a modification to the confirmed plan.
10 Moreover, Debtors did not satisfy the requirements for an early
11 discharge. Therefore, the bankruptcy court properly denied their
12 Motion for Discharge of Debts.

13
14 **B. Dismissal of the Bankruptcy Case was Warranted**

15
16 Under § 1307(c), on request of a party in interest or the
17 United States Trustee, and after notice and a hearing, the
18 bankruptcy court may dismiss a chapter 13 case for "cause,"
19 including "material default by the debtor with respect to a term
20 of a confirmed plan." 11 U.S.C. § 1307(c)(6).

21 Here, Trustee filed a notice of default and possible
22 dismissal of Debtors' case because they were in default in plan
23 payments. At the May 5, 2005 hearing, Trustee informed the court
24 that Debtors were still in default.

25 Debtors did not present a plausible defense to Trustee's
26 motion to dismiss, but only advanced their labored fantasies about
27 how the Code should be construed. We have affirmed the bankruptcy
28 court's conclusion that Debtors' so-called notes and offers of

1 tender were legally insufficient, because they did not comply with
2 the Code, which was the applicable substantive law. Therefore,
3 the bankruptcy court did not abuse its discretion in dismissing
4 Debtors' chapter 13 case.

5
6 **C. The Orders Were Not Void Due to Lack of**
7 **Due Process, Fraud or Judicial Bias**

8 Debtors argue three grounds for asserting that the bankruptcy
9 court's Order Denying Motion for Discharge of Debts and Order
10 Dismissing Case were void: lack of due process, fraud, and
11 judicial bias.

12 Due process guarantees notice and an opportunity to be heard
13 where a protected property or a liberty interest is at stake.
14 What constitutes due process and adequate notice depends on the
15 facts and circumstances of each case. Owens-Corning Fiberglas
16 Corp. v. Ctr. Wholesale, Inc. (In re Ctr. Wholesale, Inc.), 759
17 F.2d 1440, 1449 (9th Cir. 1985). In general, notice must be
18 reasonably calculated to apprise the parties of the pendency of
19 the action and afford interested parties a reasonable opportunity
20 to respond. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S.
21 306, 314 (1950).

22 Debtors have not complained that they did not have notice of
23 the May 5th hearing, or that they were unable to participate in a
24 meaningful way. They appeared pro se after their attorney's
25 motion to withdraw was granted at that same hearing, and then they
26 requested additional time to obtain new counsel. The bankruptcy
27 court agreed that new counsel was vital to their cause, and
28 allowed Debtors 20 days in which to obtain new counsel and file a

1 motion for reconsideration or take other action, such as
2 converting the case to chapter 7. Debtors, therefore, were not
3 prejudiced by their attorney's withdrawal. See Reyes-Melendez v.
4 I.N.S., 342 F.3d 1001, 1006 (9th Cir. 2003) (constitutional due
5 process claims require showing of prejudice, "which means that the
6 outcome of the proceeding may have been affected by the alleged
7 violation.") However, Debtors never did obtain new counsel, and
8 have proceeded pro se since the May 5th hearing.

9 Debtors had their day in court and the full opportunity to
10 raise all issues before the bankruptcy court, and the evidence and
11 record do not support a violation of their due process rights.

12 Next, Debtors contend that Spatenka, Trustee and the
13 bankruptcy court engaged in fraud, including fraudulent
14 nondisclosure. Debtors' examples of fraud are merely their belief
15 that the court's opinions or rulings, which were simply contrary
16 to their views and arguments, were wrong. That is not enough.

17 Debtors further allege that Trustee and the court worked in
18 collusion to put the real property into foreclosure and that they
19 were not provided with a report of the distribution of proceeds.
20 There is no evidence of such collusion in the transcript of
21 proceedings of May 5, 2005, nor in any other part of the record.
22 Furthermore, any allegations that the foreclosure sale, which was
23 scheduled to occur after the bankruptcy case was dismissed, was
24 improperly conducted is well beyond the scope of this appeal and
25 the record presented for review.

26 Finally, Debtors contend that the bankruptcy judge was biased
27 and violated the judicial code of conduct. Their sole basis for
28 this assertion is based on the court's rejection of their

1 arguments. Opinions formed by the bankruptcy judge, on the basis
2 of either the facts introduced at trial or the absence of such
3 facts, do not constitute bias or impartiality unless the judge has
4 displayed a "deep-seated favoritism or antagonism that would make
5 fair judgment impossible." Liteky v. United States, 510 U.S. 540,
6 555 (1994).

7 Our review of the May 5th transcript does not reveal any
8 favoritism or antagonism on the part of the bankruptcy judge.
9 Indeed, the opposite is true. The bankruptcy judge listened
10 without interruption to the arguments and considered the facts and
11 law before rendering his rulings. He then stayed the ruling for
12 20 days in order to give Debtors a fair opportunity to obtain new
13 counsel or to file any necessary motions, including a motion for
14 reconsideration of the court's rulings.

15 Therefore, we find no basis for Debtors' assertion that
16 either the Order Denying Motion for Discharge of Debts or the
17 Order Dismissing Case was void for lack of due process, or that
18 they were based upon fraud or judicial bias.

19

20

CONCLUSION

21

22 The evidence and law supports the bankruptcy court's rulings.
23 Debtors were provided due process, but they did not file a proper
24 motion to modify their confirmed plan. Their unilateral efforts
25 to impose new conditions on Trustee and their secured creditors,
26 based upon erroneous and improper conclusions as to what law
27 should guide the course of the bankruptcy case, did not alter
28 their obligation to comply with the terms of their confirmed plan.

1 Since they defaulted, the court did not err in dismissing their
2 case. The court's rulings against Debtors' position were not
3 indicative of fraud or judicial bias. Therefore, both orders are
4 **AFFIRMED.**

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